Testimony of the Television Music License Committee
On Oversight of the Public Performance Rights Organizations

Before the
Subcommittee on Courts, the Internet, and Intellectual Property
House Judiciary Committee
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Mr. Chairman, Ranking Member Berman, and members of the Subcommittee, good afternoon. My name is Will Hoyt and I am the Executive Director of the Television Music License Committee (TMLC), representing the vast majority of local commercial television broadcast stations in the United States and its territories.

The Television Music License Committee is a non-profit association that negotiates and administers industry music performance licenses and fees with the performing rights organizations (PROs), ASCAP, BMI and SESAC, on behalf of approximately 1,200 full-power, commercial television stations in the United States and its territories. The Committee is made up of volunteers from local television stations and group broadcasters throughout the country (representatives of large and small market stations and affiliates and independents).

The ultimate goal of the TMLC is to provide a competitive marketplace for music performance rights in which local television stations (and other music users) pay a fair price for performance rights and composers and publishers receive equitable payments for the rights used by local television stations.

Thank you for inviting me to testify today. I will address the broader issues regarding all PROs in my testimony. However, first and foremost my testimony will expose a serious flaw in current copyright law that allows select PROs to undermine the music licensing system. With the exception of ASCAP and BMI, any other future PRO could - and SESAC actually does - thrive and prosper by exploiting this loophole in the system.

The issue I speak of impacts not just television stations, but every music user across the nation seeking to pay for the use of music in broadcast or cable programming as well as in business establishments. While I am the only music user witness invited to testify today, I have been urged by a broad array of music user groups to express their grave concern regarding the current manipulative practices and abuse of copyright privileges engaged in by SESAC.

Radio Music License Committee (RMLC) - Keith Meehan, the Executive Director of RMLC states, "The Radio Music License Committee joins in the concerns expressed here by the other user communities. SESAC blanket license fees for radio stations are projected to increase tenfold from 1995 to 2008 even though much of SESAC's music on radio is background music or music in commercials, -- not feature performances. But stations have to keep paying SESAC's price or risk infringement suits."

National Religious Broadcasters Music License Committee (NRBMLC) - Russell Hauth, the Executive Director of NRBLC, which represents religious, classical and other radio stations that perform limited amounts of copyrighted music during their broadcasts, has described SESAC as one of the Committee's major concerns, and called 'SESAC a monopolist with extraordinary, unconstrained, market power with whom all radio stations must deal. SESAC flatly refused that constituency's request to hold negotiations over its effective doubling of fees from 2004-2008 (the second consecutive doubling of fees over a five-year period), and also refused its request for arbitration.' He has informed me that the NRBMLC will be submitting a written statement for the record.

National Cable Television Association (NCTA) - Dan Brenner of NCTA reports "Our experience in previous negotiations with BMI and in negotiations with SESAC indicate that SESAC and future music performance organizations that aggregate music performance copyrights should be subject to the same negotiating restrictions that are applied to BMI and ASCAP, including a third party dispute resolution process that can be invoked by either party and averts the prospect of copyright infringement liability while that process takes place."

It is highly likely that these concerns are also shared by small, medium, and large business establishments using music such as restaurants, taverns, casinos, and health clubs.

When any music user seeks to pay licensing fees to SESAC (a situation that would pertain in dealings with any future PRO other than ASCAP or BMI), no dispute resolution mechanism exists under current law, except a lawsuit brought against the prospective licensee for copyright infringement if that user fails to agree to the license terms requested by SESAC. I will elaborate on how this unbridled power, with the accompanying risk to the user of an assessment of willful copyright damages, is skillfully manipulated by SESAC to suppress free competition and extort supracompetitive licensing rates.

Under sections 504(c) and 505 of the Copyright Act, successful plaintiffs who prove willful copyright infringement may be awarded damages of up to $150,000 *per work infringed*, as well as costs and reasonable attorney's fees. Thus, if each of the 1200 stations represented by the TMLC Committee were found liable for the infringement of just one song, the total damages at $150,000 per song would be $180 million! These damages would far exceed any reasonable costs of a license to perform music on local television.[1]

[1] To underscore the risks for users associated with refusing to take a SESAC license, in August 1998, SESAC commenced a copyright infringement action against a radio broadcaster in Pittsburgh in which SESAC sought, and was ultimately awarded, willful infringement damages *dozens* of times higher than the blanket license fees SESAC had requested from the station. See SESAC, Inc. v. WPNT, Inc., 327 F. Supp.2d 531 (W.D. Pa. 2003) (denying defendants' motion for a new trial).

Music Licensing – Fundamental Principles that Govern ASCAP and BMI

Currently, there are three music performance organizations operating in the U.S. – ASCAP, BMI, and SESAC. ASCAP, the oldest performing rights organization, is a non-profit association and represents the greatest number of composers and publishers. While BMI was formed and is still nominally owned by broadcasters, it is operated as a not-for-profit corporation representing the interests of composers and publishers in head-to-head competition with ASCAP and SESAC. Today BMI is roughly comparable in size to ASCAP. Until recently, the music performing rights market was dominated by these two large PROs. Between them, ASCAP and BMI controlled the public performance rights in virtually all of the copyrighted musical works broadcast by local radio and television stations or shown on cable television in the United States. Because no individual composer can simultaneously license his or her works through more than one performing rights organization, the net effect was that both ASCAP and BMI enjoyed monopoly power over the licensing of the millions of works they represent on behalf of the respective composers who affiliate with them. In sum, stations must have licenses from both PROs.

The local television industry, typifying in most ways the experience of the other major broadcast and cable media, has engaged in a multi-decade effort to instill some degree of competition in the music performing rights market. The TMLC has been a leader in achieving significant reforms in the marketplace dominated by ASCAP and BMI.

Today, there are three fundamental principles that guide the relationship among ASCAP, BMI and all music performance rights consumers. The first and most important is the third-party dispute resolution process that can be invoked by either party and averts the prospect of copyright infringement liability while that process takes place. The second is a provision that allows composers to negotiate individually with users in lieu of accepting royalty payments as determined by their PRO's royalty distribution formula (non-exclusive composer affiliation contracts); and the third is a requirement that the PRO offer a license in which the user pays fees only for programs in which its music is actually used (the "per program" license) instead of a fee for access to the entire repertoire of the PRO (the "blanket license").

Background on ASCAP and BMI Developments and Observations

In large part the principles described above were derived through the dispute resolution process that exists with regard to ASCAP and BMI. Through invocation of the third-party dispute resolution procedures provided as part of the ASCAP consent decree, our industry was able to make major strides in the direction of a freely-competitive market for music performing rights.

First, in 1990 the federal district court determined that it is inappropriate to tie the license fees paid by television broadcasters to their advertising revenues. Second, the court gave teeth to the per-program provisions of the ASCAP decree. The court structured a per-program license that gave many local stations a realistic opportunity to pay directly for the services of a composer in their community to write the theme for their local news programming and not have to pay ASCAP again for those same rights.

More recently, a group of background music service industry licensees of ASCAP and BMI attained court rulings that should similarly stimulate access to competitive license alternatives for

a wide group of music users. The Second Circuit Court of Appeals as to BMI and the Federal District Court for the Southern District of New York as to ASCAP have affirmed users' rights to a blanket license, the fee for which must reflect "credits" for direct licensing initiatives by the licensee.

Last November, ASCAP and the TMLC reached agreement on a license for local television stations that will end in 2009. The agreement was made after months of preparing for a similar rate court proceeding under the consent decree guidelines. The facts and theories that greatly influenced the decision by both parties to reach agreement were included in discovery and position papers filed as part of this dispute resolution process. The mere availability of a dispute resolution process forces the parties to clarify and document their positions, which, in turn, often leads to a negotiated settlement based on the information shared between the parties.

Many of these advances have been adopted by the Justice Department and incorporated into the recently-amended ASCAP consent decree for the benefit of all users.

I would be less than honest if I sat before you today and reported that the progress music users have been making with ASCAP and BMI has resulted in the kind of market-based music licensing to which music consumers are entitled. It remains difficult to convince many composers, music publishers and program producers to break with the ways of the past and agree to engage in alternative license discussions.

I would like to make two specific observations about TMLC's current positions concerning license provisions that we believe will strengthen the competitive market for music performance rights. First, a license similar to the license advocated by the background music industry and sustained by the courts relative to ASCAP and BMI will benefit both copyright owners and users. Such a license provides licensees an economic incentive to direct license individual music performances within an individual broadcast program, thus providing copyright owners a competitive choice when they decide to license their performance rights. The current BMI and ASCAP per program licenses entitle these organizations to deny this competitive choice unless all of the composers within a program agree to direct license their music. Second, access to electronic cue sheets (the documents that record information about each performance within a television program) will create a more efficient system for determining music use and equitable royalty distributions to copyright owners. Although the TMLC advocates a cooperative effort to establish such an electronic data base, ASCAP and BMI currently have denied the TMLC and all other parties with an interest in music performance licensing the right to invest in, participate in, purchase or license the rights to RapidCue, a system jointly developed and operated by these two large PROs.

Indeed, it is still a chore to obtain in any form from the PROs complete and accurate information as to the music which they license that appears in our programming, even though much of that information is readily available to those organizations in the form of music cue sheets prepared by third parties and supplied regularly to them. By artificially branding such cue sheets as "proprietary," when in fact all they contain is a listing of musical works that are publicly performed on broadcast television, the PROs have needlessly made the process of accountability for what they license and its marketplace value a game of cat-and-mouse.

Nevertheless, over the last several decades, thanks in large part to the dispute-resolution mechanisms described, a good deal of progress has been made among ASCAP, BMI and music users moving toward meaningful competition in the performing rights marketplace.

SESAC's Abuse of the Music Licensing Process

Today we would like to focus on an overriding obstacle that has emerged in recent years that threatens to severely limit all of the competitive gains that the TMLC and others have made, and to revert the music performing rights marketplace to one which freezes out any meaningful competition. That is the emergence of a third, wholly-unregulated licensing organization whose practices are a throwback to the early days of ASCAP and BMI. That organization is SESAC, which is not new to the marketplace, but which has grown sufficiently in licensing repertory so as to develop an avaricious licensing-fee appetite and market power that commands supracompetitive prices.

SESAC is distinct from ASCAP and BMI in several key respects. It is the only organization that operates with a profit motive. It is substantially smaller than ASCAP and BMI in terms of composers, publishers, and its repertoire of music. Most importantly, it operates without the legal constraints imposed on BMI and ASCAP.

Every major media industry has a long line of SESAC "horror stories" to recount. Written testimony to be submitted by other groups will, no doubt, elaborate. Common to these stories is an exorbitant demand for license fees, unsupported by any evidence of actual usage of SESAC-repertory works and a refusal to extend licenses to permit negotiations. The threat of an infringement suit permeates every communication, meeting, discussion, and negotiation. Accordingly, the music user has two alternatives: either pay the ransom or face the implied or real threat of an infringement suit since there is no third party dispute resolution process.

The impact of SESAC practices is especially evident in local television station licensing due to the nature of television programming. Local stations license syndicated programming months and often years in advance. It is often the most popular programming they broadcast. Stations' costs to acquire and promote highly coveted programs like "Seinfeld," "Oprah" and "Everybody Loves Raymond" are huge and unprecedented. Ironically, the only creative right not included in a syndicated program license is the music performance right. The music is embedded in these programs by the producers and, under syndicated license agreements, the station cannot eliminate or change the music in these programs. This fact allows a PRO like SESAC to control the licensing of performance rights within designated television programs and then insist that the program cannot be aired unless the television station pays whatever SESAC unilaterally determines is a fair price. Thus, if SESAC signs a composer formerly associated with BMI or ASCAP whose music is part of one of the more popular shows, a station is forced to sign a license agreement with SESAC in order to protect a significant investment in its syndicated program. The resulting license fee with SESAC can be significantly more than the previous BMI or ASCAP fee for the same exact music in the same program.

Since SESAC was purchased by the current investment group in 1992, the owners have pursued an aggressive "take it or be sued for infringement" approach to music licensing that has abused the privileges conferred on the individual composers and music publishers SESAC claims to represent. In 1995, although SESAC was unable to demonstrate any meaningful increase in the use of its repertory, SESAC announced to local television stations a **DOUBLING** of industry-

wide blanket license fees effective almost immediately. At the same time, SESAC required ABC, CBS and NBC to sign separate performance rights agreements covering music in their network programming, which previously had been included in the local station license.

Since most, if not all, of the SESAC affiliates were previously ASCAP or BMI members and most of their music has already been written and pre-recorded in television programming, SESAC licenses do not create a music licensing market, increase output, afford composers competitive license fees of which they otherwise would be deprived, or offer any other meaningful efficiencies for consumers. SESAC licenses instead impose a new and unjustifiable cost for music that otherwise would be included within licenses already paid for by local stations. And when SESAC lures a composer from ASCAP or BMI, the ASCAP and BMI rates do not fall commensurately to account for the change.

The coercive effect of SESAC's licensing practices is further exacerbated by its inability and/or unwillingness to disclose the identities of all its affiliated composers and publishers and works under license in a comprehensive and timely manner. In contrast, ASCAP is required under its consent decree to make available a public list containing the title, date of copyright, writer, and publisher of all works in its repertory, and is barred from bringing an infringement action as to works not listed.

While SESAC has provided the TMLC with a list of affiliated composers whose works appear on a recurring basis in local broadcast television programming, SESAC has not undertaken comprehensively to identify all of the works that may appear on local television, and without question enjoys the leverage that such lack of full knowledge on the stations' part provides. ***Thus, even if local stations were scrupulously to avoid programming reflected in SESAC's lists, they would still face significant risk of copyright infringement if they unknowingly broadcast SESAC music in commercials or unknowingly make incidental or occasional uses of SESAC music in other programming.*** In direct contrast to ASCAP there is no restriction on SESAC's ability to sue for infringing uses of music in the SESAC repertory not identified on lists provided to stations.

Local television stations thus, have no alternative to taking a SESAC blanket license. This lack of information contributes to the impossibility of eliminating SESAC music from programming and works in combination with the other elements of SESAC's licensing practices to force reliance on the blanket license at the risk of being sued for copyright infringement for failing to obtain one.

SESAC's ability to demand supracompetitive rates from consumers is based on its ability to aggregate the licensing authority of strategic composers and use the hammer of copyright infringement damages to force a fee resolution to SESAC's satisfaction.
This method of operation has enabled SESAC to gain an ever-increasing market advantage over ASCAP and BMI, which cannot operate in so unconstrained a manner, and threatens to undermine decades of progress in the music performing rights marketplace and freeze out meaningful competition.

What makes SESAC so difficult to contend with, and affords it such anticompetitive potential, is not simply its disdain for settled marketplace fee-level expectations, shaped in many instances by decades of rate court decisions on ASCAP fees. It is, rather, the fact that SESAC brazenly exploits the aggregated power of the copyright rights held by its composer-affiliates free of any

third-party arbiter, such as a rate court or arbitration forum, to place a check on its license rates. Accordingly, SESAC does, and any other future PRO without a consent decree could, engage in the following practices:

- Refuse to afford alternative dispute resolution mechanisms that can be invoked by **either party** in the event of a negotiating impasse, so as to allow the more balanced approach present as to ASCAP and BMI of continuous access to the organization's musical repertory in return for a fair and dispassionate fee-determination mechanism.

- Refuse to provide interim copyright protection during negotiations when the user is actively seeking a license

- Resort to "gun-to-the-head" licensing tactics with users or user groups unwilling to agree to SESAC's blanket license fee demands, creating deadlines by which an agreement must be reached, failing which authority to use SESAC music on an ongoing basis will be revoked

- Obtain exclusive license authority from key radio and television composers, creating enormous hold-up potential in its license negotiations with major users who are effectively unable to maintain their day-to-day programming intact unless they acquire a performance license with SESAC or a newly created organization.

- Refuse to bargain over alternative forms to the single-price blanket license, whether in the form of a meaningful per-program license, a blanket carve-out license, or the like.

In stark contrast to the legal framework and fundamental principles that apply to ASCAP and BMI, armed with the power to trigger infringement suits, SESAC freely engages in practices that undermine the music licensing system and provide no meaningful choice to music users seeking to pay copyright fees. We believe that there is a compelling case for Congress to act on this issue.

Congress Should Create a Dispute Resolution Mechanism

Our nation's copyright laws exist to encourage, protect and reward intellectual creativity. SESAC's music licensing practices do not foster that result but, instead, cynically misuse the power that SESAC has aggregated to attempt to wring as much money out of trapped users as it can. Left unchecked, such practices will continue to undermine and erode copyright policy and might serve to encourage development of new PROs similarly unconstrained by existing copyright law.

Only Congress can address this issue in a manner that uniformly applies to SESAC as well as future PROs. We are seeking legislation that:

- applies only to PROs not operating under a consent decree
- establishes a third-party dispute resolution process that can be initiated by either party to determine reasonable fees, and
- averts the prospect of copyright infringement liability during the pendency of such proceedings.

The legislative solution we are seeking is in line with already-established procedures as to ASCAP and BMI for resolving music licensing fee disputes. Music users and ASCAP and BMI have had access to the rate court for decades. In addition, under Chairman Sensenbrenner's leadership, in 1997 Congress acknowledged and enacted music fairness legislation creating a dispute resolution mechanism available to small and medium business establishments through the federal courts.

SESAC has also provided evidence that arbitration is a viable dispute resolution mechanism. They included the option, with the choice to initiate **only at their sole discretion**, in their 1997 agreement with the TMLC. The fact that SESAC just recently exercised their unilateral option to trigger arbitration proceedings with the TMLC is further evidence that they should not object to such a process in and of itself.

One might surmise that their unilateral option to initiate arbitration combined with their proclivity to threaten infringement action simply allows the abuse of their copyright privileges to persist. If SESAC suggests that they have or are willing to offer bilateral arbitration within negotiations with TMLC, it would only support our contention that the concept itself is viable and should apply to all music users and all future PROs not subject to consent decrees.

The challenge we have brought before the subcommittee is not just a SESAC issue. SESAC's practices have simply exposed what any new PRO not under a consent decree can do to manipulate the current law. It requires a legislative solution to fix the broad challenge and allow the integrity of the copyright system to prevail.

We look forward to working with the subcommittee to meet this challenge and hope to craft legislation that will address it in a fair and reasonable way. I am confident that that other music user groups who were not able to be heard today will join in this request fully communicating their views in written testimony.